

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

EDGAR W. TUTTLE, ERIC BRAUN; THE
BRAUN FAMILY TRUST; and WENDY MEG
SIEGEL, on behalf of themselves and all other
similarly situated,

Plaintiffs,

v.

SKY BELL ASSET MANAGEMENT, LLC,
GARY R. MARKS, GEOFFREY M. KITSCH,
MICHAEL SELL, AGILE SKY ALLIANCE
FUND, LP, AGILE SKY ALLIANCE FUND GP,
LLC, AGILE GROUP LLC, GREENBERG &
ASSOCIATES, INC., d/b/a AGILE INVESTORS,
INC., NEAL GREENBERG, EDEN
ROCK FINANCE FUND, LP, SOLID ROCK
MANAGEMENT LIMITED, ERCM LLP,
SANTO VOLPE, ERNST & YOUNG LLC,
NIGHT WATCH PARTNERS, LP, SKY BELL
OFFSHORE PARTNERS, LTD., PIPELINE
INVESTORS, LP, SKY BELL SELECT, LP,
WAILED PARTNERS, LP, WAILED CAPITAL
GP, LLC, WAILED ADVISORS, LP, PROSPECT
CAPITAL, LLC, WILLIAM BELHUMEUR,
ROTHSTEIN KASS & COMPANY, P.C.,
MCGLADREY & PULLEN, LLP,

Defendants.

No. C 10-03588 WHA

**ORDER GRANTING
PLAINTIFFS' MOTION TO
EFFECT SERVICE OF PROCESS
THROUGH COUNSEL FOR THE
GREENBERG DEFENDANTS**

Plaintiffs have filed an administrative motion requesting authorization to effect service of process through counsel for defendants Neal Greenberg and Greenberg & Associates, Inc. d/b/a Agile Investors, Inc. (Dkt. No. 70). The complaint alleges: "Neal R. Greenberg [] is a principal of Greenberg & Associates, Inc. d/b/a/ Agile Investors, Inc., which controls Agile Group" (Compl. ¶

20). Neal Greenberg, Greenberg & Associates, and Agile Group LLC, are all named as defendants in this action. Agile Group has already appeared, through Attorney Mark Forrester. Counsel for Agile Group will not accept service for the Greenberg defendants.

Plaintiffs have attempted to serve the Greenberg defendants at their place of business, which was unsuccessful as the office had been abandoned, and at Neal Greenberg's home, which was unsuccessful as the house had been foreclosed upon. Plaintiffs have now identified an attorney named Steven Feder of Denver, Colorado, who represents Neal Greenberg in at least one other matter, and who — according to statements apparently made by Feder to plaintiffs' counsel herein — is "anticipated" to represent the Greenberg defendants in our matter.

Plaintiffs have been in contact with Attorney Feder, but Feder will not voluntarily accept service on behalf of the Greenberg defendants, and we have no confirmation that he does in fact represent them in our matter. After their initial phone call in November 2010, it appears from e-mails submitted in support of the instant motion that Attorney Feder has been evasive regarding whether he represents the Greenberg defendants and, if not, in providing plaintiffs with information about how they can otherwise effect service. Meanwhile, plaintiffs have been unable to find a current address at which the Greenberg defendants can be personally served. Plaintiffs ask the Court to bless service on Attorney Feder as effective service on the Greenberg defendants.

Due process requires "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950) (citations omitted). "Rule 4 is a flexible rule that should be liberally construed so long as a party receives sufficient notice of the complaint." *United Food & Commercial Workers Union v. Alpha Beta Co.*, 736 F.2d 1371, 1382 (9th Cir. 1984). Our court of appeals has approved service through a party's attorney in a different proceeding as "an agent impliedly authorized to accept service of process on a client's behalf," so long as (i) the attorney represents the party "in a related adversary proceeding," and (ii) "the totality of the surrounding circumstances demonstrates the intent of the client to convey such authority." *In re Focus Media, Inc.*, 387 F.3d 1077, 1082–83 (9th Cir. 2004).

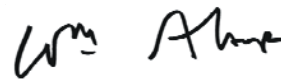
Serving the Greenberg defendants through Attorney Feder satisfies due process. Conventional means of service have been unsuccessful. Plaintiffs have submitted evidence demonstrating that Attorney Feder is counsel for Neal Greenberg in an administrative proceeding before the Securities and Exchange Commission (Giblin Decl. Exh. B). That proceeding concerns Greenberg's actions as the head portfolio manager of Agile Group, the same defendant that plaintiffs herein allege Greenberg and Greenberg & Associates controlled. Although the administrative proceeding concerns different alleged violations of law, it is a related adversary proceeding as it concerns the same underlying facts.

Moreover, Attorney Feder's own statements manifest the requisite evidence of authority conveyed by the principals, the Greenberg defendants. Attorney Feder represented to plaintiffs' counsel that he is in communication with the defendants and anticipated representing them in this action. Yet he has since not been willing to voluntarily accept service on their behalf or help plaintiffs otherwise effect service (Giblin Decl. ¶ 5 and Exh. C). Viewed in conjunction with Attorney Feder's representation of Neal Greenberg in the administrative proceeding, these facts lead this order to conclude that Attorney Feder can properly be viewed as an agent impliedly authorized to accept service on the Greenberg defendants' behalf in this proceeding. Accordingly, plaintiffs' motion to effect service of process through Attorney Feder is **GRANTED**.

In the future all parties shall not file motions concerning substantive matters disguised as motions concerning miscellaneous administrative matters under Civil Local Rule 7-11. Although by the terms of the second amended case management order, a précis was not required to precede the instant motion, the parties are reminded of the précis requirement moving forward (Dkt. No. 69 ¶ 10). The parties shall not evade that requirement by filing their substantive motions as administrative motions.

IT IS SO ORDERED.

Dated: February 28, 2011.



WILLIAM ALSUP
UNITED STATES DISTRICT JUDGE